



FEDERAL ELECTION COMMISSION

11 CFR Part 110

[Notice 2017-12]

Internet Communication Disclaimers; Reopening of Comment Period

AGENCY: Federal Election Commission.

ACTION: Reopening of comment period.

SUMMARY: On October 13, 2011, the Federal Election Commission published an Advance Notice of Proposed Rulemaking (“ANPRM”) seeking comment on whether to begin a rulemaking to revise its regulations concerning disclaimers on certain internet communications and, if so, on what changes should be made to those rules. On October 18, 2016, the Commission reopened the comment period to receive additional comments in light of legal and technological developments since that document was published. The Commission has decided to again reopen the comment period to receive additional comments in light of developments since that document was published. The Commission is not seeking comment on, nor does it propose changes to, any other rules adopted by the Commission in the Internet Communications rulemaking of 2006.

DATES: The comment period for the ANPRM published October 13, 2011 (76 FR 63567) is reopened. Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: All comments must be in writing. Commenters are encouraged to submit comments electronically via the Commission’s website at www.fec.gov/netdisclaimers or at <http://www.fec.gov/fosers>, reference REG 2011-02. Alternatively, commenters may submit

comments in paper form, addressed to the Federal Election Commission, Attn.: Neven F. Stipanovic, Acting Assistant General Counsel, 999 E Street NW., Washington, DC 20463.

Each commenter must provide, at a minimum, his or her first name, last name, city, state, and zip code. All properly submitted comments, including attachments, will become part of the public record, and the Commission will make comments available for public viewing on the Commission's website and in the Commission's Public Records Office. Accordingly, commenters should not provide in their comments any information that they do not wish to make public, such as a home street address, personal email address, date of birth, phone number, social security number, driver's license number, or any information that is restricted from disclosure, such as trade secrets or commercial or financial information that is privileged or confidential.

FOR FURTHER INFORMATION CONTACT: Mr. Neven F. Stipanovic, Acting Assistant General Counsel, or Ms. Jessica Selinkoff, Attorney, 999 E Street NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

SUPPLEMENTARY INFORMATION: On October 13, 2011, the Commission published in the Federal Register an ANPRM seeking comment on whether and how to revise the rules at 11 CFR 110.11 regarding disclaimers on internet communications.¹ Specifically, the Commission was considering whether to modify the disclaimer requirements for certain internet communications, or to provide exceptions thereto, consistent with the Federal Election Campaign Act, 52 U.S.C. 30101-46 ("the Act"). The Commission received seven substantive comments in response to the ANPRM. All but one of the commenters agreed that the Commission should update the disclaimer rules through a rulemaking, though commenters differed on how the Commission should do so.

¹ See Internet Communication Disclaimers, 76 FR 63567 (Oct. 13, 2011).

As discussed in the ANPRM, a “disclaimer” is a statement that must appear on certain communications to identify who paid for it and, where applicable, whether the communication was authorized by a candidate. 52 U.S.C. 30120(a); 11 CFR 110.11. With some exceptions, the Act and Commission regulations require disclaimers for public communications: (1) made by a political committee; (2) that expressly advocate the election or defeat of a clearly identified federal candidate; or (3) that solicit a contribution. 52 U.S.C. 30120(a); 11 CFR 110.11(a). While the term “public communication” generally does not include internet communications, it does include “communications placed for a fee on another person’s Web site.” 11 CFR 100.26.² In addition to these internet public communications, “electronic mail of more than 500 substantially similar communications when sent by a political committee . . . and all Internet websites of political committees available to the general public” also must have disclaimers. 11 CFR 110.11(a).

Commission regulations set forth certain exceptions to the general disclaimer requirements. For example, disclaimers are not required for communications placed on “[b]umper stickers, pins, buttons, pens, and similar small items upon which the disclaimer cannot be conveniently printed.” 11 CFR 110.11(f)(1)(i) (the “small items exception”). Nor are disclaimers required for “[s]kywriting, water towers, wearing apparel, or other means of displaying an advertisement of such a nature that the inclusion of a disclaimer would be impracticable.” 11 CFR 110.11(f)(1)(ii) (the “impracticable exception”).

As discussed in the ANPRM, some internet advertisements are so character-limited that providing all the disclaimer information required by the Act may take up much of the available ad characters. See Advisory Opinion 2010-19 (Google) (describing 95-character search result

² The Commission is currently proposing amendments intended to modernize a number of regulations, including 11 CFR 100.26. To review those proposals and other Commission rulemaking documents, visit <http://www.fec.gov/fosers>, reference REG 2013-01.

advertisements); cf. Advisory Opinion Request 2011-09 (Facebook) (describing several categories of advertisements ranging from zero to 160 characters).³ However, the ANPRM noted that technological options may allow for the display of disclaimers when a user “hovers” or “rolls” over the advertisement, or on the landing page to which the user is taken after clicking the advertisement.⁴

After publication of the ANPRM, the Commission considered these issues in new factual contexts. See, e.g., Advisory Opinion Request 2013-18 (Revolution Messaging) (asking whether “banner ads” viewed on mobile phones, either in website or app, required disclaimers); MUR 6911 (Frankel) (considering whether candidates’ and political parties’ Twitter profiles and individual tweets required disclaimers).⁵ Also, after the ANPRM was published, at least one additional state joined California in adopting regulations to address small internet advertisements.⁶

In light of these and other legal and technological developments, the Commission reopened the comment period on October 18, 2016, seeking comments addressing persons’ experiences in complying with (and receiving disclosure from) these state rules as well as other disclosure regimes.⁷ The Commission sought comments that addressed:

- how campaigns, parties, and other political committees, voters, and others disseminate and receive electoral information via the internet and other technologies, including any

³ Documents related to Commission advisory opinions are available on the Commission’s website.

⁴ See, e.g., Contents of Disclosure Statements. Advertisement Disclosure, Cal. Code Regs. tit. 2, sec. 18450.4(b)(3)(G)(1) (California small internet ad disclosure rule discussed in ANPRM).

⁵ Documents related to Commission enforcement matters under review (MURs) are available on the Commission’s website.

⁶ See Electronic Media, Requirements, Md. Code Regs. 33.13.07.02(D)(2)(b).

⁷ See Internet Communication Disclaimers; Reopening of Comment Period and Notice of Hearing, 81 FR 71647 (Oct. 18, 2016). In the document, the Commission also indicated it would hold a hearing on February 1, 2017. However, because few commenters expressed interest in the hearing, the Commission postponed it.

data or experiences in purchasing, selling, or distributing small or character-limited advertisements on websites, apps, and mobile devices;

- any challenges in complying with the existing disclaimer rules as applied to internet communications;
- the technological or other characteristics that might define a “small” internet advertisement;
- how a disclaimer requirement or exception for “small” internet advertisements might be implemented;
- the informational benefits of disclaimers on internet communications to assist voters in identifying the source of advertising so they are better “able to evaluate the arguments to which they are being subjected”;⁸
- the informational benefits of disclaimers on internet communications, including websites and social media pages, to avoid voter confusion and reduce the incidence of solicitations that appear to be for candidates but are actually for non-candidate committees; and
- the extent to which the Commission’s consideration of disclaimer requirements should take into account current or anticipated models of internet advertising.

The Commission received six comments during the reopened comment period, all but one of which supported updating the disclaimer rules. Commenters, however, differed on whether the Commission should adopt technological modifications to disclaimer requirements for all online advertisements or exempt paid advertisements on social media platforms from the disclaimer requirements.

⁸ Citizens United v. FEC, 558 U.S. 310, 368 (2010) (quoting First Nat’l Bank of Boston v. Bellotti, 435 U.S. 765, 792 n.32 (1978)).

Since the close of the latest comment period, the Commission has again considered disclaimer requirements as applied to online communications by American citizens.⁹ In light of recent developments since the close of the latest comment period, the Commission is interested in receiving further comments on whether and how to revise its rules regarding disclaimers on certain internet communications. The Commission seeks additional comments addressing the bullet points above and any issues discussed in the ANPRM; the Commission is particularly interested in comments addressing advertisements on internet-enabled applications and devices (such as apps, eReaders, and wearable technology). Given the speed at which technological advances are developing, the Commission welcomes comments that address possible regulatory approaches that might minimize the need for serial revisions to the Commission's rules in order to adapt to new or emerging technologies.

On behalf of the Commission,

Steven T. Walther,
Chairman,
Federal Election Commission.

Dated: October 3, 2017.

⁹ See, e.g., Advisory Opinion 2017-05 (Great America PAC et al.) (concerning whether committees' Twitter profile pages require disclaimers and how committees may use Twitter handles in disclaimers).

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